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No. 912

In the
Supreme Court of the United States
OCTOBER TERM, 1966.

ALPHONSE F. COZZI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Alphonse F. Cozzi, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on Dec. 15, 1965.

JUDGMENT AND OPINION OF THE COURT BELOW

On Dec. 15, 1965, the United States Court of Appeals for the Seventh Circuit affirmed a judgment of conviction entered in the United States District Court for the Northern District of Illinois, sentencing your petitioner to imprisonment for a term of seven years. The Court

of Appeals' opinion as yet has not been reported. It is printed herein as Appendix A.

JURISDICTIONAL STATEMENT

After a jury trial, the petitioner was convicted of unlawful possession of goods stolen while moving in interstate commerce, knowing they had been stolen, in violation of 18 U.S.C.A. Section 659.

On appeal to the United States Court of Appeals for the Seventh Circuit, the judgment of conviction was affirmed by an opinion filed Dec. 15, 1965 (Appendix A).

The jurisdiction of this Court is invoked under the provisions of Title 28, U.S. Code 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Was the petitioner's right to counsel as guaranteed by the Sixth Amendment denied when:

a. The trial judge refused to allow the withdrawal of an attorney who said he was caught in a conflict of interest in representing both the petitioner and a co-defendant?

b. The trial judge refused to allow petitioner's newly-selected attorney, who was present in court, sufficient time to acquaint himself with the facts of the case?

c. The trial judge failed to inquire into the alleged conflict of interest, showed no concern about it, and refused to allow the petitioner the opportunity to speak —despite the urging of both attorneys?

2. Is the pre-trial statement of an experienced trial lawyer that he is involved in a conflict of interest sufficient, at the least, to arouse the trial judge's curiosity, if not his concern, without a post-trial showing of on-the-record prejudice?

3. Was it necessary for the petitioner to make a specific showing of prejudice after he was denied representation by effective counsel of his own choosing?

4. Is the United States Court of Appeals for the Seventh Circuit free to ignore this Court's decision in *Glasser* v. *United States,* 315 U.S. 60 (1942), especially where the *Glasser* case arose from conviction and affirmance in the Seventh Circuit?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 6:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Arraignment of the three defendants took place on Oct. 28, 1964.

At that time, attorney Samuel Banks appeared on behalf of the defendant Butera and the appellant Cozzi. He said he represented Butera. He said the appellant Cozzi was represented by John Cogan, but that Cogan was allowing him to represent Cozzi for purpose of the arraignment. (A. 4-5).

The court at that time obtained the appellant's approval of this arrangement. (A. 4). Pleas of not guilty were then entered for both defendants. (A 5)

On Nov. 13, 1964, the cause was reset for trial to Dec. 2, 1964. At that time, Cogan appeared as attorney of record for both Cozzi and Butera. (A. 2).

When the case was called for trial on Dec. 2, 1964, attorney Cogan represented the defendant Butera and the ap-

pellant Cozzi. When the court asked Cogan if he was ready for trial, he replied: "One of the defendants is ready. Butera wishes to change his plea this morning." (A. 5). The court then asked Cogan if he represented Butera. He answered: "I actually do, yes, sir. Mr. Banks and I are partners." (A. 5).

When the court asked Cogan if he represented the third defendant, DiLella, the atorney replied: "No, your Honor, I represent Mr. Cozzi." (A. 5).

Attorney Cogan represented Butera while the court warned the defendant of the nature of the charge against him and the possible punishment he might receive. (A. 6-7). The court then entered a judgment of conviction against Butera. (A. 7).

When the court asked whether the defendant Butera was in custody, the government attorney, Arthur Dunne, informed the court Butera was at large on a $2,500 bond. Dunne said the government would have no objection to allowing Butera to remain on the same bond if the court should see fit. (A. 7).

The court then said: "Well, Mr. Dunne did your work for you, Mr. Cogan." (A. 7). Cogan responded: "Yes, sir, I appreciate that." (A. 7). The court then concluded the day's proceedings by saying: "I won't say on your motion, but at the suggestion of the government, the defendant Butera may be enlarged on bail pending disposition of his case in the sum of $2,500.00 with surety as previously given. The cause will be set for trial as to the other defendants." (A.7). Sentencing of the defendant Butera was set for Dec. 30, 1964. (A. 2). The trial of DiLella and the appellant Cozzi was set for Dec. 14, 1964, at 10 a.m. (A. 2).

On Dec. 8, 1964, the government caused to be issued a subpoena to Anthony Frank Butera commanding his pres-

ence at the trial on Dec. 14, 1964, "to testify and give evidence on behalf of the United States." (A. 2)

When the case was called for trial shortly before 11 a.m., Dec. 14, 1964, the prosecutor, Mr. Dunne, said the government was ready. (A. 8). The following then took place:

Mr. Cogan: May I address the court?

If the court recalls, the last time the matter was up, the third defendant in this case, Butera, pleaded guilty before your Honor and his matter was set over to the 30th of this month for disposition. After that, some time around the middle of last week, I believe, the government—I spoke to Mr. Dunne and I know this to be true—Mr. Dunne caused a subpoena to be served on Butera to have him testify apparently on behalf of the government. In view of that, the service of that subpoena, I feel that in representing Cozzi, I have an adverse interest here, a conflict of interest. Mr. Cozzi has contacted Mr. Morris Meyers, who is here this morning and ready to substitute for me if the court will grant him time to get prepared in this matter.

Is that right, Mr. Meyers?

Mr. Meyers: That is correct. If I may address the court—

The Court: Yes, Mr. Meyers. (A. 8).

Mr. Meyers: If your Honor please, Mr. Cozzi consulted with me on Saturday morning and advised me substantially in accordance with what Mr. Cogan has told your Honor, that Mr. Cogan did represent two defendants, one of whom pleaded guilty. There seems to be little misunderstanding between Mr. Cogan and Mr. Cozzi. Mr. Cozzi asked me to represent him. I said "I cannot unless I get leave of court to file my appearance for you and unless I get some time in which to acquaint myself with the facts." I understood the case was set for trial.

I respectfully ask your Honor to permit me to substitute for Mr. Cogan.

The Court: We are glad to have you, but whether or not we will let you use that as a reason for delaying the trial of this case—

Mr. Meyers: I don't mean to delay it. I just want some time to get acquainted with it.

Mr. Dunne: Your Honor, on behalf of the Government I would point out to the court that the defendant Butera is represented by attorney Samuel Banks. I would also point out to the court when Mr. Cogan called me with respect to this particular subpoena served on the defendant Butera, I informed him that was my understanding, that Mr. Banks represented Mr. Butera, and, further, that we had no intentions of calling the witness Butera to the witness stand. We merely wish him to be present for purpose of identification during the trial, and I don't believe that that would certainly be a valid reason for a conflict of interest all of a sudden arising a few short days ago.

The Court: Do you assure the court unequivocally that you will not call him to the witness stand?

Mr. Dunne: Yes sir, certainly, as I assured Mr. Cogan Friday night when he called me. (A. 9).

Mr. Cogan: At this point, Judge, I was not aware that Mr. Cozzi—he hadn't contacted anyone else at that point.

The Court: We are glad to have Mr. Meyers in if you need help, Mr. Cogan.

Mr. Meyers: He doesn't need that much help.

The Court: I will not at this point permit you to withdraw in view of the assurance of the government.

Mr. Meyers: Judge, the defendant I thought might want to say something. This is nowise to be considered as any criticism of Mr. Cogan.

The Court: Do you—

Mr. Meyers: Do you want to tell anyone—

The Court: He has got two lawyers. I don't know why we should listen to him. Most defendants don't want to be asked and I think it is right. I think that the court should not question a defendant after indict-

ment, but if with the approval of Mr. Cogan, his client wants to say something here—

Mr. Cogan: I have no objection.

The Court: And not assign it as error as has been done here in these courts—

Mr. Cogan: I have no objection.

The Court: —in the event of conviction, I will let him say what he wants to.

Mr. Meyers: For the purpose of having the court understand he wants counsel of his own choice represent him.

Mr. Dunne: This matter was up a scant week ago and there was nothing of this nature said at all.

The Court: He is entitled to counsel of his own choice.

Mr. Meyers: It is not an old indictment, Judge.

The Court: But he chose his counsel, Mr. Meyers, back in October, October 22 this indictment was voted. (A. 10).

Mr. Meyers: It is not an old case, Judge.

The Court: It is old in these courts, Mr. Meyers. Out on 26th Street where you are accustomed to practicing more often than you are here, it may not be, but here an October case is an old case.

Mr. Meyers: May he respectfully—

The Court: We will hold it until 2:00 o'clock to let you get acquainted with it.

Mr. Meyers: I couldn't possibly.

Mr. Dunne: Your Honor, I would also point out to the court we have approximately five witnesses from New York and Cleveland here. They were here last week, the matter was continued, and they are here again this week.

The Court: In view of the fact that the defendant is on the way, whoever he is—what is his name?

Mr. Dunne: Mr. DiLella.

Is he here, Mr. Marshal?

The Marshal: He is here.

The Court: Hold it for trial until 2:00 o'clock.

Mr. Meyers: Judge, I couldn't possibly get in under those circumstances. I am—

The Court: Mr. Meyers, that's the way we operate here. We don't permit this sort of thing to—

Mr. Meyers: It hasn't been done for any purpose of unduly delaying the matter.

The Court: I make no comment on that at all. 2:00 o'clock.

Mr. Cogan: In view of the fact that the court refuses the request of Mr. Meyers, will we start this morning or at 2:00 o'clock?

The Court: 2:00 o'clock. The other defendant isn't here.

Mr. Cogan: Butera is here. Do you wish him to be present during the entire trial? (A. 11).

Mr. Dunne: Yes, Mr. Butera is under subpoena. He can report back tomorrow morning.

Mr. Cogan: Do you want him in the court room during the entire trial?

Mr. Dunne: No.

(Whereupon at 11:00 o'clock a.m., the trial of the above entitled cause was adjourned until 2:00 o'clock p.m. of the same day.) (A. 12).

The trial began at 2 p.m. on Dec. 14, 1964. (A. 12).

After the jury was chosen, the prosecutor made his opening statement. (A. 12). The appellant's attorney, John Cogan, waived opening argument. (A. 12).

After the court suggested a recess, the prosecutor said: "Judge, our first witness is from New York, but he has been here and I have talked with him earlier and said that

we may run a little late today. He is perfectly happy to stay over and testify tomorrow. I have taken care of that." (A. 12).

The trial was then recessed until the following morning. (A. 13).

Butera was present during the course of the trial. He did not testify for either the government or the defense, although he was used by the government for identification purposes. (A. 14).

Only one witness, Elmer Buchholz, testified on behalf of the defense. (A. 15). The appellant did not testify in his own behalf.

The trial concluded December 18 with a verdict of guilty by the jury. (A. 16).

On Dec. 23, the appellant was sentenced to seven years imprisonment. (A. 16).

The co-defendant Butera, who had earlier pleaded guilty, received a sentence of three years imprisonment. (A. 3).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This Court has demonstrated a grave concern with the nature of an accused's right to cousel as it exists outside the courtroom, before and after the indictment stage. How tragically ironic it would be, then, if nothing further were said about the denial incurred by your petitioner in full view of the trial judge and the Seventh Circuit Court of Appeals.

In brushing aside the events leading to the trial and conviction of your petitioner, those honorable judges transformed the right to counsel from substance to shadow. The

decision below (Appendix A) conflicts with the expressions of at least six other United States Circuit Courts of Appeals and with the express teaching of this Court in *Glasser* v. *United States*, 315 60 (1942).

Your petitioner was represented by an attorney during the trial. We cannot, in good faith, contend the trial, on its face, was a farce or mockery of justice.

On the contrary, it is the insidious nature of the denial that requires the intervention of this Court. Should the decision below stand unreviewed, the result would be great confusion in the judicial determination of the meaning of effective counsel of one's own choice.

I. The Denial of Counsel

When your petitioner's case was called for trial on Dec. 14, 1964, his attorney, John Cogan, asked leave to withdraw. He informed the trial judge he had "an adverse interest here, a conflict of interest." (A. 8) Only two days earlier, your petitioner had contacted another attorney, Morris Meyers, who was present in court Dec. 14. The events leading to that day's motion indicate an attempt to mislead the judge and the United States Attorney as to who actually represented your petitioner and his co-defendant, Butera. (A. 4-5).

At any rate, the trial court, without making any inquiry into the nature of the conflict, refused Cogan's motion to withdraw. He further refused to allow petitioner the opportunity to speak, despite the urging of both Cogan and Meyers. (A. 8-11).

Your petitioner had taken affirmative steps to point out and dispel the conflict. He took the only course open to a layman defendant. He hired another lawyer.

A recent decision by the United States Court of Appeals for the District of Columbia sets a greater and conflicting standard of a trial judge's duty to inquire into the conflict of interest issue once it is raised. *Campbell* v. *United States*, 352 F. 2d 359 (USCA DC 1965). There, a conviction was reversed because the trial judge did not inquire into the facts surrounding two defendants' decision to proceed with the same counsel.

The decision of the United States Circuit Court of Appeals pits that Court against this Court's holdings in *Glasser* v. *United States*, 315 U.S. 60, 75-76 (1942); and *United States* v. *Hayman*, 342 U.S. 205 (1951). In *Glasser*, your Honors said: "Glasser wished the benefit of undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected." In the *Hayman* case, this Court held that a defense counsel's conflict of interest, if not waived by the defendant, constituted a denial of the effective assistance of counsel.

The decision of the Court below is in conflict with that of the Sixth Circuit Court of Appeals in *Craig* v. *United States*, 217 F. 2d 355 (6th Cir. 1954), where the conflict of interest became apparent during the trial. That Court relied on *Glasser* and *Hayman*.

In denying your petitioner's right to counsel of his own choice the Seventh Circuit Court of Appeals is in direct conflict with the Third Circuit, *United States* v. *Bergamo*, 154 F. 2d 31, 34 (3rd Cir. 1946); and with its own prior decision in *United States* v. *Koplin*, 227 F. 2d 80 (7th Cir. 1955). Both decisions taught that trial judges must not be so eager to dispose of indictments that a defendant is forced to trial without his chosen attorney.

The decision below raises a question that is sure to arise time and time again: When must the trial judge give

an attorney more time to prepare his defense? Here, attorney Meyers refused to enter the case because the judge insisted the trial begin at once. Refusing a continuance to a defendant seeking counsel of his own choice was grounds for reversal in the following cases: *United States* v. *Johnston*, 318 F. 2d 288, 291 (6th Cir. 1963); *Releford* v. *United States*, 288 F. 2d 298 (9th Cir. 1961); *Walleck* v. *Hudspeth*, 128 F. 2d 343, 345 (10th Cir. 1942); *Paoni* v. *United States*, 281 F. 801 (3rd Cir. 1922); and *Gomez* v. *Heard*, 218 F. Supp. 228 (S.D. Texas, 1962) aff'd per curiam 321 F. 2d 88 (5th Cir. 1963).

Thus, the decision below serves notice that if the right to counsel of one's own choosing is to be meaningful, the trial judges must have guidelines to follow in determining when to allow more time to obtain counsel and when to permit an accused to make a desired change of counsel.

Certainly, there must be a better test than the one used by the Seventh Circuit Court of Appeals. Citing *United States* v. *Bentvena*, 319 F 2d 916 (2d Cir. 1963), the decision below states that "an accused's Sixth Amendment right to select counsel of his own choice does not permit arbitrary action which obstructs orderly procedure in the courts." But in the *Bentvena* case, most of fourteen defendants had acted in an incredibly abhorrent manner, using every tactic possible, including pushing and threatening jurors, swearing at the judge, and throwing chairs at prosecutors to delay or stop the trial. They had been able to secure continuances for ten months by hiring and firing lawyers. Surely, that kind of extreme case cannot stand as authority for the holding below.

II. The Requirement of Prejudice

In its decision, the Seventh Circuit Court of Appeals places emphasis on the petitioner's failure to show specific instances of prejudice in the trial of his cause. Indeed, that was an accurate observation. Our position in the Court below was that the act of forcing your petitioner to trial with an attorney he did not want and expressly tried to discharge obviated the need to make any further showing, that, in fact, the trial judge was without jurisdiction to proceed further.

That contention was based on this Court's landmark holding in *Johnson* v. *Zerbst,* 304 U.S. 458, 467 (1938), where the assistance of counsel was termed an "essential jurisdictional prerequisite," and supported by this Court's more recent decisions wherein your Honors said you would "not stop to determine whether prejudice resulted" where a denial of counsel has taken place, *White* v. *Maryland,* 373 U.S. 59, 60 (1963); *Hamilton* v. *Alabama,* 368 U.S. 52, 55 (1961).

The circuit courts of appeal, too, have refused to inquire into the record for prejudice when a denial of counsel has been perceived: *Harvey* v. *Mississippi,* 340 F. 2d 263 (5th Cir. 1965), where a guilty plea followed a denial; *United States* v. *Plattner,* 330 F. 2d 271, 273 (2d Cir. 1964), where the Court said: "We would be required to remand the case even if no prejudice to Plattner were shown to have resulted from the refusal to permit him to act *pro se;* *United States* v. *Johnston,* 318 F. 2d 288, 291 (6th Cir. 1963), where the conviction was reversed even though the Court expressly said it could not find any prejudice; *Releford* v. *United States,* 288 F. 2d 298, 302 (9th Cir. 1961), where the Court noted that no actual prejudice

was shown, but that it would assume prejudice where counsel had been denied.

Thus, when the Seventh Circuit Court of Appeals perused the record for possible prejudice in order to determine whether a denial of counsel took place, your petitioner's rights under the Sixth Amendment were transformed into illusion. The impossible burden of demonstrating what might have been done but was not, and what might have been said but was not, was placed on the shoulders of your petitioner. We contend that is not the mandate of the Sixth Amendment. Only this Court can clear the air of the confusion which now exists.

CONCLUSION

We respectfully pray that your Honors will consider this a fit case to warrant this Court's attention.

Respectfully submitted,

WARREN D. WOLFSON
Attorney for petitioner

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1965—SEPTEMBER SESSION, 1965

No. 14949
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ALPHONSE F. COZZI,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

DECEMBER 15, 1965.

Before HASTINGS, *Chief Judge;* CASTLE, *Circuit Judge;* and MERCER, *District Judge.*

CASTLE, *Circuit Judge.* The defendant-appellant, Alphonse F. Cozzi, was convicted of the unlawful possession of goods stolen while moving in interstate commerce, knowing that they had been stolen, and sentenced to seven years imprisonment. He prosecutes this appeal seeking reversal on the ground the District Court denied him his Sixth Amendment right to effective counsel of his own choice.

The record discloses that the defendant was indicted with Anthony Butera, Jr., and Charles DiLella on October 22, 1964. The indictment charged a violation of 18 U.S.C.A. §659. The arraignment of the three defendants took place on October 28, 1964. Attorney John Cogan represented both Cozzi and Butera, but Cogan's partner appeared for both defendants for the purpose of arraignment. Pleas of

not guilty were entered for both defendants. On November 13, 1964, Cogan appeared for both defendants and the cause was reset for trial to December 2, 1964. On December 2, 1964, defendant Butera withdrew his plea of not guilty and substituted a plea of guilty, whereupon a judgment of conviction was entered as to him. The trial of the defendants Cozzi and DiLella[1] was set for December 14, 1964. On December 10, 1964, Butera was served with a subpoena directing him to appear on the scheduled trial date as a government witness. On December 11, 1964, Cogan was advised by the government prosecutor that the prosecution had no intention of calling Butera as a witness and that his presence was desired for identification purposes only.

When the cause was called for trial on Monday morning, December 14, Cogan represented to the court that, because of the subpoena served on Butera, he felt "that in representing Cozzi, I have an adverse interest here, a conflict of interest" and he requested the substitution of Attorney Morris Meyers as counsel for Cozzi "if the court will grant him time to get prepared in this matter". Meyers, who had been contacted by Cozzi and had consulted with him on December 12, was present in court and expressed his willingness to represent Cozzi if the matter was continued so that he could "acquaint [himself] with the facts". At this juncture the prosecutor unequivocally assured the court that Butera would not be called as a witness and he advised the court that Cogan had been so informed on the previous Friday. Meyers then suggested that the defendant "might want to say something" but the court pointed out that Cozzi had two lawyers and declined to question the defendant. The court refused to permit Cogan to withdraw as Cozzi's counsel, but expressed permission that Meyers might appear as additional counsel, and directed that the trial proceed at 2:00 P.M.

Cogan represented Cozzi during the trial which followed. Meyers did not appear. Butera did not testify but he was identified by a government agent as the Anthony Butera, Jr., referred to in the agent's testimony.

[1] The defendant DiLella was represented by separate counsel.

On the facts and circumstances disclosed by the record we perceive no violation of the defendant's Sixth Amendment right to effective representation by counsel of his own choice. Cozzi does not question the competency of Cogan, counsel of his own selection, nor the quality of Cogan's representation. There is no suggestion that Cogan's original undertaking to represent both Cozzi and Butera involved any conflict of interest—or possible prejudice to either defendant. The government's decision, subsequent to Butera's guilty plea, to require his presence at the trial for identification purposes did not precipitate such a conflict. Had Butera stood trial along with his co-defendants, Cozzi and DiLella, he would likewise have been present and subject to identification by the government witness. Thus, the subpoena calling for Butera's presence, qualified as it was by the government's assurance that Butera would not be called as a government witness, afforded no basis for the claimed conflict of interest. Nor did the court err in declining to interrogate the defendant concerning the request for substitution. Both Cogan and Meyers were present and speaking for him.

In our opinion the situation presented by the record is essentially no different from a last minute attempt by a defendant upon the call of his case for trial to substitute new counsel, merely as a matter of preference, for counsel previously personally selected, with the attendant delay in the trial to afford preparation time to new counsel. On the facts presented, the refusal of the requested substitution and the denial of a continuance were well within the court's discretion. An accused's Sixth Amendment right to select his own counsel does not permit of arbitrary action which obstructs orderly procedure in the courts. *United States* v. *Bentvena*, 2 Cir., 319 F. 2d 916, 936. It is a right to be exercised at an appropriate stage within the procedural framework of the system of criminal jurisprudence of which it is a part. Absent justifiable basis therefor there is no constitutional right to make a new choice of counsel, with attendant necessity for a continuance because thereof, at the time the trial is scheduled to

commence. No such justifiable basis is presented by the instant record.

It would serve no useful purpose to discuss the numerous cases cited and relied upon by the defendant. None are factually apposite.

The District Court's judgment order of conviction and sentence is affirmed.

AFFIRMED